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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Where an employer policy excluding all fertile women from certain jobs because of concerns for the health of any fetus that those women may conceive is challenged as unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964:

a. does the plaintiff or the defendant bear the burden of proving that the employer's justification for excluding women from certain jobs meets Title VII standards?

b. is that justification judged under the explicit provisions of the statutory affirmative defense for bona fide occupational qualifications or is the employer entitled to assert an additional, broader "legitimate business justification" defense not explicitly stated in the statute?

c. if only the statutory bona fide occupational qualification defense is available, does a fetal protection purpose come within the bounds of that defense?

2. Are scientific animal studies insufficient as a matter of law to demonstrate a significant risk to humans due to the exposure to a toxic substance?

LIST OF PARTIES TO THE PROCEEDING

The plaintiffs in the district court, appellants in the court of appeals and petitioners in this Court, are: the United Automobile, Aerospace & Agricultural Implement Workers of America International Union ("UAW"); UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516 and 1719; and Lois Sweatman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, representing the class of all past, present and future production and maintenance employees employed in bargaining units represented by the UAW at nine plants owned by Johnson Controls, Inc.

The defendant in the district court, appellee in the court of appeals, and respondent in this Court is Johnson Controls, Inc.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 886 F. 2d 871, and is reproduced at pp. 1a-101a of the Appendix to the Petition for a Writ of Certiorari ("Pet. App."). The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 680 F. Supp. 309, and is reproduced at pp. 3-20 of the Joint Appendix ("Jt. App.").

JURISDICTION

The Court of Appeals' opinion and judgment were issued on September 26, 1989. By an order entered by Justice Stevens, the time for filing a petition for a writ of *certiorari* was extended until January 12, 1990. Pet. App. 125a-26a. The *certiorari* petition was timely filed, and was granted on March 26, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*, are set out at Pet. App. 145a-46a.

STATEMENT OF THE CASE

A. The Facts

1. *The Exclusion of Women from Battery Manufacturing Positions*

Johnson Controls, Inc. ("the employer" or "the company") is a manufacturer of batteries. Occupational exposure to lead, the primary material used in the battery manufacturing process, entails a health risk to workers, including a health risk of harm to fetuses conceived by workers. Pet. App. 32a.

In 1977, Johnson Controls instituted its first official policy regarding the employment of women in lead-exposed jobs.[1] That policy stated:

> [P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons. . .
>
> Since not all women who can become pregnant wish to become mothers, . . . it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant. [Jt. App. 140.]

Consistent with that view, the company recommended that women who expected to have children choose non-lead exposed jobs. The company did not, however, provide any guaranteed transfer for women who wished to leave lead-exposed jobs in order to protect any children they might be planning to have, nor did the company protect the prior wage rate of any women who did transfer.

In 1978, the Occupational Health and Safety Administration (hereafter OSHA), acting pursuant to its statutory authority to "promulgate any . . . occupational . . . health standard" (29 U.S.C. § 655), announced its Final Standard for Occupational Exposure to Lead. 43 Fed. Reg. 52952 *et. seq.*; 29 C.F.R. § 1916.1025 (1987). When that standard was being considered, OSHA devoted particular attention to the question whether the possible effect on fetuses carried by pregnant workers justified excluding women entirely from at least certain lead-exposed positions. 43 Fed. Reg. 52960. "No topic was covered in greater depth or from more vantage points than the subject of women in the lead industry." *Id.* On the basis of its close study of the question, OSHA concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from

[1] It appears that the company did not employ any women in manufacturing jobs until after Title VII was passed. Jt. App. 157 (Fishburn).

the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52966; *see also, e.g.*, 43 Fed. Reg. 54398. Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." 43 Fed. Reg. 52966.[2]

In 1982, Johnson Controls, despite its own earlier pronouncements and those of OSHA, announced a broad exclusion of women from lead exposed jobs:

> It is [Johnson Control's] policy that women who are pregnant *or who are capable of bearing children* will not be placed into jobs involving lead exposure *or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.* [Pet. App. 9a (emphasis added); *see* Jt. App. 8 -86.][3]

Johnson Controls' policy applied to particular positions based upon whether a *single* individual in that position (not the mean or median individual) showed a blood lead level of more than 30 μg/dl once in the past year. Jt. App. 81, 123.[4] Moreover, even though the company con-

[2] Those protections, based upon the recognition that workers who are planning families should have *blood* lead levels below 30 μg/dl, included periodic biological and air monitoring beginning at 30 μg/m^3 *air* lead level; medical surveillance and consultation concerning the effects of lead on reproduction, including fertility testing and the right to have review by several physicians; educational and training provisions, so that "workers are fully informed of the potential hazards from exposure to lead on their reproductive ability, during pregnancy and following birth"; the right of workers planning families to use respirators for increased protection; and, where workers are planning families and reduction of blood lead levels is medically indicated, the possibility of temporary removal from lead-exposed jobs, with wage protection and assured possibility of return to the lead-exposed position for up to eighteen months. 43 Fed. Reg. 52966, 52992, 52997-98, 29 CFR § 1910.125 (k)-(n).

[3] There is one exception: incumbent women can retain their lead exposed jobs if they *individually* can reduce their blood lead levels to below 30 μg/dl. Jt. App. 83-84, 96.

[4] In fact, the record shows that at the time the record in this case closed, nearly two-thirds of employees in lead-exposed positions had blood-lead levels below 30 μg/dl. Jt. App. 145-46.

ducts individual blood lead testing as often as monthly on other employees (Jt. App. 124), the employer did *not* allow any women seeking to be hired or promoted into lead-exposed positions to demonstrate through individual blood monitoring an ability to keep her blood lead level below 30 μg/dl. *See Jt.* App. 88-89 (Beaudoin) (blood lead levels at the same work station can vary based on individual metabolism, good hygiene, and use of respirators.) And, there is no explanation in the record as to why the ban extended beyond the jobs actually exposed to lead. Finally, the company banned *all* women who could not prove their infertility from lead-exposed jobs, regardless of their family status, age, sexual orientation, fertility of sexual partner, or expressed intent to bear children.

The sum of the matter is that, in practical terms, the company barred women capable of bearing children from *all* manufacturing jobs in its battery plants (except a few held by incumbent women), and from some nonmanufacturing jobs as well. Jt. App. 56, 115.

2. *Harms Caused by Lead*

Lead is a toxic substance that can cause a wide range of health problems in men, women, and children, depending upon the exact exposure level. *See generally United Steelworkers of America v. Marshall*, 641 F.2d 1189, 1248-49 (D.C. Cir. 1980). In particular, "at least one part of the body, the reproductive system, begins to suffer very serious subclinical effects at 30 μg/100g of lead in the blood." *Id.* at 1249. Those effects, according to OSHA, include *both* a real danger to fetuses carried by pregnant employees resulting from lead exposure *in utero and* other serious impacts upon the reproductive systems of *both* men and women:

> The rulemaking produced ample evidence confirming the grave danger lead poses to prospective mothers and fetuses. . . OSHA [also] found evidence that lead-exposed males suffer serious harm to their spermatogenesis, including malformed sperm (teratospermia), decreased mobility of sperm (asthenospermia), and decreased number of sperm (hypospermia) . . . . Older studies found alarmingly high rates of spontaneous abortion, stillbirth, and birth defects in the pregnancies of women married to lead-exposed workers. . . . Other studies found chromosomal abnormalities among lead exposed [male] workers.
>
> OSHA thus found abundant support for the view that a lead standard must protect the reproductive capacities of males as well as females. [*Id.* at 1257.]

On the basis of its lengthy consideration of the issue, OSHA decided that:

> [B]ecause of the demonstrated adverse effects of lead on reproductive function in both male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30 microgram/100 g maximum permissible blood level in *both males and females who wish to bear children*. [29 C.F.R. Part 1910, pp. 833-34 (1987) (emphasis supplied).]

The District of Columbia Circuit approved this finding as well supported by the extensive administrative record. *United Steelworkers of America v. Marshall*, 647 F.2d at 1248-49.

Not surprisingly given this background, there was no dispute among the experts in this summary judgment proceeding on the basic fact that, as OSHA had concluded, lead poses a risk of significant harm to fetuses of pregnant workers at the 30 μg/dl blood lead level.[5] The

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[5] At the relatively low blood lead levels which Johnson Controls regards as sufficient to bar fertile women, the primary risk is that the children born will have "very subtle" learning problems (Jt. App. 170 (Chisholm)) and may exhibit behavioral problems such as hyperactivity (Pet. App. 15a). The record is *undisputed* on the fact that, contrary to the Court of Appeals statement, fetal lead exposure at the levels involved in this case does *not* cause structural abnormalities in vital organs. *E.g.*, Jt. App. 170, 171, 176 (Chisholm); 240 (Silbergeld).

There was some evidence, including a Center for Disease Control (hereafter CDC) report, that the risk of cognitive and behavioral

record on summary judgment in this case does not, however, address in any detail how likely it is that any particular child born to a mother who had at some point a blood lead level higher than 30 μg/dl will show harm traceable to prenatal lead exposure. *See e.g.*, Jt. App. 170 (Chisholm Dep.) ("we are dealing with a risk factor . . . [and] really can't say about individuals").[6]

There was directly conflicting evidence in the summary judgment record concerning the *other* harms caused by lead at the blood lead levels enforced by Johnson Controls for fertile women. Plaintiff's experts were uniformly of the view that, as OSHA had concluded, the available evidence, including some studies completed after the OSHA record was closed, support the conclusion that at 30 μg/dl, there is "no scientific basis to conclude that the reproductive risks experienced by males or females are different in severity at equal blood lead levels . . . [or that] offspring are at greater risk if either the male or female

harm to children exposed to lead *in utero* occurs at blood lead levels lower than 30 μg/dl. *See* Pet. App. 14a. OSHA, however, not the CDC, is the agency charged by Congress with determining occupational health standards, including fetal health standards. 29 U.S.C. §§ 651(b)(2) and (b)(5); *see United Steelworkers v. Marshall*, 647 F.2d at 1256 n.96 (injury to fetuses is cognizable under OSHA since such injury "is a material impairment of the reproductive systems of the parents.")

[6] There was also conflict in the competing experts' affidavits and depositions (including conflict between the employers' own experts) on precisely how and when the primary harm to the fetus through the mother occurs (*compare* Jt. App. 150 (Fishburn) (risk is in early weeks of pregnancy); 190 (Whorton) (same) with *id.* at 165, 167, 177 (Chisholm) (risk is only in the latter half of the last trimester of pregnancy); 199 (same); 239 (Silbergeld) (same). Further, while there was testimony that lead may be stored in the bones, and may therefore reappear in the blood after the worker leaves a lead exposed position, the record is entirely indistinct as to how long a woman would have to work in lead exposure to have such a buildup, except that it would have to be for some period of time. *E.g.* Jt. App. 168, 170, 201 (Chisholm) (cannot say whether a woman working two months would have sufficient lead buildup to endanger fetus); 182 (Scialli) (builds up if work "for any length of time").

parent has been lead exposed at equivalent levels." Jt. App. 262 (Silverstein).[7] Defendant's experts maintained, to the contrary, that there was either no evidence of a reproductive effect on males or of a fetal effect mediated through males, or that there was no evidence of such effects at the 30 μg/dl blood lead level at issue in this case.[8]

Plaintiff's experts were also of the view, backed by both animal and human studies reported in scientific papers, that there is a significant risk to the health of *adult* men and women at the 30 μg/dl level, including neurological and cardiovascular injury, and an increased likelihood

[7] Jt. App. 202-203, 221, 222 (Silverstein); 223, 238 (Silbergeld); 257 (Legator). Specifically, one of plaintiff's experts, Dr. Silverstein, a board certified physican in occupational medicine, pointed to studies indicating (1) that human sperm abnormalities are caused by lead exposure, and sperm abnormalities indicate genetic damage which may cause developmental abnormalities; (2) that the offspring of male animals exposed to lead show decreased learning ability; (3) that there are adverse reproductive effects, including infertility and impotence, in male animals and in human men at blood lead levels below 30 μg/dl. Jt. App. 205-215, 219. *See also*, on male reproductive effects, Jt. App. 226-227 (Silbergeld).

In particular, one study of male lead battery plan workers, concluded in 1984 by the National Institute of Occupational Safety and Health (NIOSH), reported a significant loss of fertility in families where the men had been exposed to lead, including a 25% loss of fertility where the male worker had a blood lead level of 25-44 μg/dl and the wives had blood lead levels much lower. Jt. App. 207-208, 216-219 (Silverstein). Another expert similarly reviewed specific animal and human studies and concluded that male-mediated effects in a worker's offspring can occur at the same blood-lead levels that are unsafe for a female employee's fetus. That expert stressed that studies showing spontaneous abortions in wives of lead-exposed men at high levels of lead exposure indicate fetal genetic effects at lower levels, since a miscarriage is, of course, a *lethal* fetal effect. Jt. App. 249-252, 258, 259 (Legator).

[8] Jt. App. 72 (Hammond); 155 (Fishburn); 186 (Whorton); *id.* at 192 (data on testicular effects on men unclear); 199 (Chisholm).

of certain forms of cancer.[9] For example, Dr. Ellen Silbergeld "would be concerned for anybody that has a blood lead level of 25," because "at these levels, everyone is at very severe and significant risk, male, female or fetus." Jt. App. 243, 246. Defendant's experts denied any adult effects at blood levels below 50 μg/dl in general terms, but did not specifically refer to or dispute the evidence relied upon by plaintiff's experts. Jt. App. 72 (Hammond); 180 (Scialli) (risk to fetuses "may" occur at lower levels); 200 (Chisholm); 253 (Legator).

B. The Proceedings Below

This challenge to Johnson Control's policy excluding fertile women from battery manufacturing jobs was filed by eight employees, certified as representatives of a class of similarly situated employees, and the union representing the employees, the International Union, UAW. Among the individual plaintiffs were Mary Craig, who elected to have herself sterilized in order to avoid loss of a desirable employment position (Jt. App. 35, 62);

[9] Jt. App. 203-205, 222-225 (Silverstein); 227-228, 243, 244, 246 (Silbergeld); 262, 263 (Silverstein) (incorporating articles showing psychological, cardiovascular, and carcinogenic dangers due to blood lead at equivalent exposure levels to those at which Johnson Controls excludes fertile women). One of plaintiff's experts noted, for example, that recent studies of adults show that they suffer mood changes at 30-40 μg/dl exposure level, and a significant increase in high blood pressure at 15-25 μg/dl blood lead level. Jt. App. 227, 229, 243, 245 (Silbergeld). The Environmental Protection Agency ("EPA") relied upon the blood pressure studies in considering the further reduction of lead in gasoline. *See* 50 Fed. Reg. 9400-01 (1985) (EPA discussion of studies demonstrating that adult males are subject to an increased risk of high blood pressure, with resultant dangers of heart disease and strokes, at blood lead levels well below those which Johnson Controls considers safe for fertile women); W. Marcus and C.R. Cothern, *The Characteristics of An Adverse Effect: Using the Example of Developing a Standard for Lead*, 16 Drug Metabolism Reviews 423, 430 (1985-86) ("if blood lead levels were lowered from 17 to 10 micrograms/deciliter there would result in savings of a minimum of 50,000 [heart attacks], 70,000 strokes and 25,000 predicted deaths over a 10-year period").

several female employees (one of whom, Elsie Nason, was fifty years old and divorced) who were transferred from lead-exposed positions, with loss in compensation (Jt. App. 31, 32, 33, 35, 59, 60-61); and Donald Penney, a male employee whose request for a leave of absence for the purpose of lowering his blood lead level because he intended to become a father, was denied (Jt. App. 36, 66-69).

After discovery, the company sought, and the District Court granted, summary judgment. That court held:

> Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory. . . [Jt. App. 17.]

The District Court therefore treated the explicitly gender-based policy in this case as if the employer had adopted a neutral policy with only a disparate *impact* upon women as a group, and, applying an "expanded . . . business necessity defense," refused to invalidate the discriminatory policy. Jt. App. 17-20.[10]

On appeal, the Seventh Circuit, sitting *en banc*, affirmed by a 7-4 vote. First, the Court of Appeals majority agreed with the district court's basic disparate impact business necessity approach (Pet. App. 27a), but went further, placing on the *plaintiff*, not on the employer the burden of persuasion on the two key evidentiary issues that purportedly justify departure from ordinary facial discrimination analysis—whether the danger to fetuses is substantial, and whether there is fetal danger only due to female exposure, or due to male exposure as well. Pet. App. 28a-32a.

[10] The District Court did not determine whether Johnson Controls' policy can be justified under the "bona fide occupational qualification" (hereafter bfoq) exception to Title VII, but did note that the policy would not meet traditional bfoq standards because "an employee's job performance would not be affected by pregnancy." Jt. App. 17 n.5.

Second, although the District Court had declined to reach the issue, the Court of Appeals decided that "Johnson Controls' fetal protection policy could be upheld [on summary judgment] under the bona fide occupational qualification defense." Pet. App. 42a. Where a business may present some danger to the health of a fetus carried by an employee, providing perfect protection for the fetus, said the Court of Appeals, is part of the "essence" of the business. Pet. App. 48a. Rather than remanding for consideration of the factual elements of the bfoq defense, the Court of Appeals majority went on to review on its own the summary judgment record, and held that the defense was established. Pet. App. 50a-54a.

The four dissenters wrote three dissenting opinions. All the dissenters were of the view that a case such as this one must be analyzed as a facial discrimination case, as to which the only pertinent defense is the bfoq defense provided by § 703(e), 42 U.S.C. § 2000e-2(e). Pet. App. 60a, 62a-64a, 75a-81a. Judge Easterbrook, joined by Judge Flaum, further maintained that the proffered justification—the moral imperative of protecting fetal health from mistaken parental risk assessments—does not, as a matter of law, meet the statutory standard of equal treatment of employees "similar in their ability or inability to work," and is not a legally cognizable bfoq. Pet. App. 81a-87a. Judges Posner and Cudahy, in contrast, were of the view that the bfoq defense may, in very narrow circumstances, be available for justifying fetal protection policies, but believed that it was entirely inappropriate to grant summary judgment for the employer on the present record. Pet. App. 60a, 76a-74a.

SUMMARY OF ARGUMENT

I. By proving that Johnson Control's fetal protection policy explicitly establishes an additional job qualification, proof of infertility, for all women and no men, the plaintiffs have met their burden under Title VII of demonstrating a violation of the proscription against mak-

ing gender-based employment decisions. This conclusion does not change with the observation that only women can bear children. In enacting the Pregnancy Discrimination Act ("PDA") in 1978, Congress specifically intended to proscribe as gender-based discrimination distinctions based upon childbearing capacity, recognizing that such distinctions were the basis for many of the policies that had relegated women to inferior status in the workplace. Johnson Controls' policy also violates the three underlying purposes of proscribing explicit sex discrimination in the workplace: assuring the treatment of employees individually, rather than as members of proscribed groups; preventing gender-based stereotypes from tainting the decisionmaking process and stigmatizing women; and making certain that those policies that adversely affect women, even unavoidably, do not institionalize their detrimental effect, but instead change in response to relevant background changes.

II. Under Title VII, an employer can justify facial sex discrimination in distributing employment opportunities only under the § 703(e) exception for bona fide occupational qualifications ("bfoq"). That affirmative defense is an extremely limited one, and has no application here. First, both Title VII precedents and the PDA make clear that only requirements relating to effective job performance can constitute a bfoq. Absent this limitation, employers would be free to subordinate the basic nondiscrimination norm of Title VII to their individual values, rely upon non-job-performance related goals as a cover for discriminatory assumptions or stereotyped thinking, and decide complex health issues based on their needs rather than on the determinations made by agencies, such as the Occupational Safety and Health Administration, designated by Congress. Secondly, if available, a bfoq defense based upon fetal protection concerns would be far from narrow, and indeed could severely undermine the Title VII proscription upon sex discrimination in employment. Finally, to meet broq standards in the

present situation, at the very least an employer would have to show that the fetal harms sought to be avoided are only mediated through women; that the company protects occupational health generally at the same level as it protects fetal health; that fetal concerns relate to the "essence" of the particular business on some basis *not* applicable to businesses generally; and that the *degree* of protection provided is "reasonably necessary" to the business. The Court of Appeals either made no inquiry into or committed error in considering each of these requirements.

ARGUMENT

In this case the petitioners challenge Johnson Control's policy providing that "[a]ll women except those whose inability to bear children is medically documented" are barred from "jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." Jt. App. 81, 85, 86.[11] It is our contention that this policy, on its face, constitutes disparate treatment of women in violation of § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; that the employer has not met its affirmative burden of demonstrating that the policy is saved by the "bona fide occupational qualification" defense stated in § 703(e) (the "bfoq" defense); and that Title VII does not provide any defense other than the bfoq defense for employer policies that constitute facial sex discrimination. We treat with § 703(a) in part I of our argument and with the affirmative defense aspect of this case in part II.

I. JOHNSON CONTROLS' FETAL PROTECTION POLICY CONSTITUTES FACIAL DISCRIMINATION ON THE BASIS OF SEX.

A. The two basic legal principles that govern a Title VII facial discrimination case such as this one and de-

[11] There is an exception for certain incumbent fertile female employees. *See* p. 3, *supra*.

termine whether the plaintiffs have carried their initial burden of proof are now clearly established. First of all,

> In passing Title VII, Congress made the simple but momentous anouncement that sex, race, religion, and national origin are *not relevant to the selection, evaluation, or compensation of employees*. . . . In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's . . . sex." 42 U.S.C. §§ 2000e-2 (a)(1),(2) (emphasis added). We take these words to mean that *gender must be irrelevant to employment decisions*. [*Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775, 1784-85 (1989) (plurality opinion) (citation omitted).]

Thus, the heart of a Title VII facial discrimination case is proof that the employer "relied upon sex-based considerations in coming to its decision." *Id.* at 1786. In other words, as Justice O'Connor put this same point in her concurring *Price Waterhouse* opinion,

> There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. [*Id.* at 1798.]

Second, and of equal significance here, as Justice O'Connor went on to note, "*explicit* consideration of race, color, religion, sex, or national origin in making employment decisions 'was the most obvious evil Congress had in mind when it enacted Title VII'." *Id.* at 1803, quoting *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977) (emphasis supplied). Consequently, a disparate treatment plaintiff satisfies her burden of proof by "demonstrat[ing] by *direct evidence* that an illegiti-

mate factor played a substantial role in . . . [the] decision." 109 S. Ct. at 1803 (emphasis added).

For example, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the plaintiffs established that there was an express company policy permitting pilots "disqualified from serving in that capacity for reasons other than age to transfer automatically to the position of flight engineer". *Id.* at 114. This Court recognized that because this policy, standing alone, provided "*direct evidence* that the method of transfer available to a disqualified captain depends upon his age," the policy

> *is discriminatory on its face. Cf. Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (employer's policy requiring female employees to make larger contribution to pension fund than male employees is discriminatory on its face). [469 U.S. at 121-122 (emphasis added).]

In sum, where an employer issues an employment policy that explicitly distinguishes between employees on the basis of sex, that policy, without more, constitutes facial sex discrimination, and is sufficient to make out a Title VII disparate treatment case.

The threshold question here, then, is whether Johnson Controls' fetal protection policy is discriminatory on its face; if so, the plaintiffs have carried their initial burden of showing that the policy is unlawful under Title VII and the Court of Appeals' contrary conclusion is wrong.[12]

[12] The only alternative that has been suggested for analyzing cases challenging gender-based fetal protection policies posits that at least some such cases as ones involving not facial sex discrimination, but an employment practice with only a disparate impact upon women. Pet. App. 22a-23a; *Wright v. Olin Corp.*, 697 F.2d 1172, 1186 (4th Cir. 1982) (en banc); *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1548-49 (11th Cir. 1984).

The distinction is, of course, one of great significance in Title VII law: Where a plaintiff *cannot* "prove intentional discrimination," but can only demonstrate a "facially *neutral* employment practice[] that [has] significant adverse effects on [a] protected *group*," the plaintiff may still be able to prove a Title VII case, but "[t]he factual issues and the character of the evidence are inevitably somewhat different" than in a disparate treatment case. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) (emphasis added).

Specifically, as this Court spelled out last term, where a plaintiff *cannot* prove that a distinction was made by taking gender into consideration, then the *plaintiff* must identify a specific employment practice, prove its discriminatory impact, and "bear[] the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration" that is not "insubstantial." *Ward's Cove Packing Co. v. Atonio*, — U.S. —, 109 S. Ct. 2115, 2126 (1989).

The reason that, in a true disparate impact case, the employer's justification need only be a legitimate business reason, and "[t]he utimate burden of persua[sion] . . . remain[s] with the plaintiff" is that in such a case, only by negating the employer's asserted *neutral* justification can the plaintiff establish that a particular employment practice, although facially neutral, is "in operation . . . functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. at 986, 987.

In contrast, where the plaintiff proves an employment practice that *explicitly* distinguishes between men and women, the burden of demonstrating gender-based discrimination is necessarily met, and need not be met a second time. *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion); *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. 702, 711 (1978); *Trans World Airlines v. Thurston*, 469 U.S. at 121.

B. (1) The employment policy at issue sorts eligible from ineligible employees by establishing different job qualifications and procedures along explicit gender lines: Women generally, *but no men*, are presumed ineligible for certain jobs, and are denied covered jobs unless they come forward with information regarding their reproductive capacity. Jt. App. 159-160.[13] Requiring proof of sterility as a precondition to obtaining or retaining a

[13] With regard to incumbent fertile women, the policy provides that they may be able to retain their jobs, but will be required to undergo substantially more blood lead level testing than men, use respirators when men do not, and maintain lower blood lead levels than men and do so on pain of removal from their jobs if their blood lead levels rise above the woman's level. Jt. App. 57-61, 80-81. Thus, incumbent women too are presumed ineligible, and are allowed to retain their jobs only on special conditions not applicable to men.

job is, in itself, a serious intrusion into very sensitive matters, even for those whose personal reproductive situation conforms to the employer's requirement. Moreover, those who cannot provide the information are as a practical matter forced to choose between their job opportunities and their childbearing capacity. Since many women are economically dependent upon their jobs, putting women to that choice conditions employment for women, but not for men, upon the inability to exercise "the right to have offspring . . . one of the basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 536, 541 (1942).[14]

Johnson Controls' fetal protection policy therefore involves an explicit difference of major proportions in the way *all* men and *all* women are treated for job assignment purposes. As such, the company's policy is facially discriminatory, because it "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *City of Los Angeles, Department of Water v. Manhart*, 435 U[illegible] at 711.

(2) Viewing Johnson Controls' fetal protection policy more narrowly—and thus more favorably to the company—as one that excludes from covered positions the subgroup of women with the capacity to bear children, does not alter the conclusion that the policy on its face violates the Title VII proscription upon "us[ing] gender as a criterion in employment." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion).

A policy that explicitly establishes different job qualifications for men and for women is unlawful facial discrimination on the basis of sex, even though some (or even most) women are able to meet the special qualifica-

[14] Ms. Mary Craig, one of the named plaintiffs in this case, submitted to sterilization on June 27, 1983 in order to be assured of retaining her job. Jt. App. 62-63. *See also, e.g., Oil Chemical & Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444, 446 (D.C. Cir. 1984).

tion established for their gender. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). (Title VII invalidates "one hiring policy for women and another for men—each having preschool children.") There is no exception to this general principle for qualifications centering upon women's capacity to carry fetuses within their bodies during gestation; *viz.*, to bear children. That this is so was made clear, if it was not clear before, by the Pregnancy Discrimination Act ("PDA") of 1978.[15]

The PDA provides that, for Title VII purposes, "The terms 'because of sex' or 'on the basis of sex' include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions." Title VII § 701(k), 42 U.S.C. § 2000e-(k). The physical ability to become pregnant and to bear a child is certainly a medical condition "related" to pregnancy and to childbirth. The PDA's background and legislative history, moreover, show that Congress specifically intended with this statutory language to make it clear that discrimination premised in any way on women's capacity to bear children *is* discrimination based squarely on gender, and is *not* a facially neutral employment policy. Indeed, Congress regarded that principle as central to eliminating the disadvantage suffered by women in the workplace.

The background of the PDA begins with this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *Gilbert* held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136. The *Gilbert* dissenters disagreed, with Justice Stevens in particular expressing the view that pregnancy-based dis-

[15] While, as we recount below, there were pre-1978 legal disputes concerning whether disparate treatment of actual pregnancies is sex discrimination and this Court determined that it is not, there is nothing in any case indicating that the Court would have approved a hiring policy, or a disability plan, that *excluded all women with childbearing capacity*. Because Congress passed the PDA before any such issues arose, however, this Court was never required to pass on such a policy.

crimination is sex discrimination because "it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 162 (Steven, J., dissenting).

In enacting the PDA, Congress "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision," and instead took the view that it was " 'the dissenting Justices [who] correctly interpreted the Act.' " *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678, (1983) (*quoting* H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. p. 2 (1978) (hereafter H.R. Rep.), Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources) (hereafter Leg. Hist.) at 148 (1979)); *see also California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 277 n.6 (1987).

In particular, the PDA's legislative history reflects Congress' intent to incorporate into Title VII the proposition that "a classification that harms only women and does so on the basis of a factor inextricably linked to gender is . . . discrimination against women." Leg. Hist. at 23 (remarks of Rep. Hawkins).[16] Further, the reporting committees specifically recognized that "the ability to become pregnant is the fundamental difference between genders" (S. Rep. at 2, Leg. Hist. at 39), and explicitly approved, as "correctly express[ing] both the principle and the meaning of title VII" the passage from Justice Stevens' *Gilbert* dissent to that effect quoted above (S. Rep. at 2-3, Leg. Hist. at 39-40; H. Rep. at 2, Leg. Hist. at 148).[17]

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[16] *See also* S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) (hereafter S. Rep.) at 4, Leg. Hist. at 41 (describing the bill as "defin[ing] sex discrimination . . . to include those physiological occurrences peculiar to women"), H.R. Rep. at 5, Leg. Hist. at 151 ("the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.")

[17] *See also id.* at 168 (remarks of Rep. Sarasin) (same); *id.* at 69 (remarks of Sen. Bayh) ("what this measure is designed to do is to say to . . . employers . . . 'thou shall not discriminate against a classification within the workforce, women, because women are uniquely capable of becoming pregnant' ").

As Senator Williams—the chief sponsor of the bill in the Senate and the chairperson of the committee that reported the bill—explained, the concept that discrimination based on childbearing capacity is unlawful under Title VII is central to the purpose of the PDA:

> The legislation is . . . important because, in the long run, it will permit the 36 million working American women to assume their rightful place, and make a full contribution to our Nation's economy. . .
>
> These shocking statistics [concerning job segregation of women] cannot be made better unless working women are provided effective protection against discrimination on the basis of their childbearing capacity. . . . Because of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement granted to other workers. . . . Thus, the overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular to a second-class status with regard to career advancement and continuity of employment and wages. [Leg. Hist. 61-62.][18]

Consistent with this purpose, as incorporated in Title VII § 703(a)(1), the effect of the PDA is to proscribe a "refus[al] to hire . . . any individual, or . . . discrim-

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[18] *See* S. Rep., *supra*, at 6-7, Leg. Hist. at 152-53:

> Women are still subject to the stereotype that all women are marginal workers. Until a women passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women. . . .

See also Leg. Hist. at 168 (remarks of Rep. Hawkins) ("many of the disadvantages imposed on women are predicated upon their capacity to become pregnant").

inat[ion] against any individual with respect to his . . . terms, conditions, or privileges of employment, . . . because of such individual's . . . [capacity to bear children]." Because Johnson Controls' policy excludes women —and only women—from certain jobs *precisely because of their capacity to bear children*, that policy is facially discriminatory under the statute as amended by the PDA.

C. Thus, whatever view one takes of the precise classification upon which Johnson Controls' fetal protection policy turns, that classification constitutes facial sex discrimination within the meaning of Title VII. And, Johnson Controls' policy violates not only the letter but each of the underlying purposes of Title VII's basic proscription of explicit gender-based distinctions.

There are at least three critical reasons *why* "Congress considered reliance on gender or race in making employment decisions an evil in itself." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J., concurring). All three are implicated by the employment policy here at issue.

First, Johnson Controls' fetal protection policy transgresses the line between policies based on gender-linked (or race-linked) risks, and those based on actual differences among individuals, a line central to Title VII's interdiction of explicit sex (and race) discrimination.

In making a gender-based risk assessment, one is determining that members of one sex are more likely than members of the other to possess some desirable or undesirable trait. Under Title VII, however, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. at 708. As this Court there explained, "the basic policy of the statute requires that we focus upon fairness to individuals rather than fairness to classes." *Id.* at 709. Because "[t]he statute's focus on the individual is unambiguous," Title VII ordi-

narily "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 708.

As in *Manhart*, "[t]hat proposition is of critical importance in this case because there is no assurance that any individual woman . . . will actually fit the generalization on which the [company's] policy is based." 435 U.S. at 708.[19] While the theoretical *risk* of fetal cognitive deficit may exist whenever a fertile woman is exposed to lead, only a *small percentage* of the exposed women will become pregnant, and only a *small percentage* of their offspring will be adversely affected.[20] Thus, how-

[19] In *Manhart*, and in *Arizona Governing Committee v. Norris*, *supra*, the "true generalization" was that women on the average live longer than men on the average, so that a man has a greater *risk* of death at any relevant age. *Manhart*, 435 U.S. at 712; *Norris*, 463 U.S. at 1080-81.

[20] First, the percentage of fertile women who bear children decreases with age, to almost zero for women over 40. *See* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1232-33 (1986).

Second, as the foregoing suggests, modern women are largely, if not entirely, in control of whether or not they will bear children during a certain time period. Some women do not engage in heterosexual intercourse, while others who do either are married to infertile men (including men who have had vasectomies), or have no intention of having a child and take the relevant precautions. And while it is true that contraceptives do fail, they do not necessarily or even ordinarily fail.

Third, Johnson Controls' fetal protection policy excludes women based not upon the average or median blood lead level in the job to which they aspire but upon whether *one* job incumbent has an unacceptable blood lead level. Jt. App. 83. The record shows, however, that almost two-thirds of the job incumbents in covered jobs had blood lead levels below the 30 microgram level. Jt. App. 145-46. Moreover, the company admits that with proper hygiene, employees *should* be able to keep their blood lead levels below that figure; on that basis, incumbent women were allowed to retain their lead-exposed jobs, as long as the individual incumbent controls her blood lead levels. Jt. App. 98-99.

Finally, even among women who are exposed at the blood lead level the company maintains is dangerous, and who do have children

ever, one quantifies the numbers and evaluates the risks, the only *certainty* is that the large majority of women, will, under Johnson Controls' policy, lose employment opportunities solely because of their status as a woman, and not because of any fetal injury caused by their employment. To prevent such group-based disadvantages is precisely the point of Title VII.

Nor is the statutory protection against disadvantage because of membership in a proscribed class any less simply because there might be some difficulty in demonstrating more precisely *which* members of the high risk group in fact have the trait the employer desires to discover—in *Manhart*, longevity, here, fetal harm. The reason that insurance and occupational health regulations turn largely upon assessment of *risk* of injury or death is that both concern "events that are individually unpredictable." *City of Los Angeles, Department of Water* v. *Manhart*, 435 U.S. at 710. Nonetheless, "[i]ndividual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII." *Id. See also Arizona Governing Committee v. Norris*, 463 U.S. at 1085 n.15 ("For some jobs, . . . there may be relevant skills that cannot be identified by testing. Yet Title VII clearly would not permit use of race, national origin, sex or religion as a proxy for such an employment qualification, regardless of whether a statistical correlation could be established.").[21]

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shortly thereafter, the record makes clear that whether and to what degree fetal harm will occur depends upon a host of individual circumstances, including the period and level of the exposure and the individual woman's and infant's metabolic system. Jt. App. 88, 99, 148, 182.

[21] *Cf. Craig v. Boren*, 429 U.S. 190 (1976) (where statistics show that a higher percentage of young men than young women endanger lives by driving after drinking, different drinking ages for men and women are nonetheless unconstitutional even though as dissent stated "[t]here [was] no apparent way to single out persons likely to drink and drive," (*id.* at 227 (Rehnquist, J., dissenting)).

Second, Title VII law (as well as this Court's constitutional jurisprudence) establishes that, whatever an employer's purpose in discriminating, there is an important long-term policy reason for insisting upon a difference of controlling significance between a policy that in terms classifies individuals in a proscribed or suspect fashion, and one that is stated and pursued neutrally, but turns out to have a disparate impact, even if the disparate impact is identical to or closely parallels a gender classification. *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. at 710 & n.20; *Arizona Governing Committee v. Norris*, 463 U.S. at 1085-86 & n.15; *compare Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

That significance inheres, in large part, in the fact that "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups . . ." (*Manhart*, 435 U.S. at 709), and create a "stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex," (*Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J., concurring)). Given the history of stereotyped and prejudiced thinking and decisionmaking with respect to certain classifications of employees, a major purpose of Title VII is "a prophylactic one" (*Albemarle Paper Co. v. Moody*, 442 U.S. 405, 417 (1975)), designed to reform employers' decisionmaking and communication processes, and to remove any stigma attached to belonging to one of the proscribed classifications.

For this reason, while an employer's purpose in adopting a distinction based upon gender may be relevant in the ultimate determination whether the policy is lawful under Title VII (*see* part II, *infra*), that purpose, however benign or laudable, is *not* relevant in determining whether the *criterion* used in the company's policy is one proscribed in § 703(a). Indeed, in many instances, an employer who discriminates on a proscribed basis does so for a *purpose* that is, standing alone, perfectly valid—for

example, determining job competence, or saving money, or increasing efficiency.[22] And, as Judge Easterbrook added below, "[i]n principle [Congress or] a court could make the legal standard turn on what the authors of a rule are trying to accomplish, rather than on the criteria they use to get there." Pet. App. 77a. But, as Judge Easterbrook also noted, this Court determined in *City of Los Angeles, Department of Water v. Manhart*, that Congress did not incorporate such a standard in Title VII. Pet. App. 77a. Instead, "Congress has decided that *classifications* based on sex, like those based on national origin or race, are unlawful," (*Manhart*, 435 U.S. at 709 (emphasis supplied)), because "whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual," (*Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J., concurring)).

As we develop in greater depth in part II of our argument, there is at least a substantial risk that employers instituting fetal protection policies are expressing, albeit unthinkingly, the stereotypical assumption that women are marginal workers whose economic importance and need for employment is necessarily subordinate to their childbearing role. Against that background, there is ample reason for insisting, as Title VII does, upon a "prophylatic" gender-neutral decisionmaking process regarding industrial safety policies.

Finally, a policy conceived and stated in neutral rather than gender-linked terms is inherently responsive to changes in the scientific or other evidence regarding the justifying purpose, while a policy conceived, justified, or expressed in a gender-linked way is inherently static even when the relevant background changes.

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[22] As Judge Posner observed in his dissent in the Court of Appeals, "it is unlikely that most employment discrimination in the private sector is irrational . . . ; competition tends to drive from the market firms that behave irrationally. See Becker, The Economics of Discrimination (2d ed. 1971)." Pet. App. 62a.

For example, the premise of Johnson Controls' policy is that fetal health concerns exist at levels considerably lower than those which present health risks to adult men and women. Respondent's Brief in Opposition at 6 n.15. That premise, as we have pointed out, was extremely dubious at the time that the record in this case closed, and has become even more dubious in the intervening years. *See* pp. 6-8, *supra*.

If Johnson Controls' fetal health policy were part of a broad, generally-stated plan linking prevention of health risks to the available evidence and to the technologically feasible control mechanisms, then such a change in scientific knowledge might be reflected in the application of the policy. Because Johnson Controls has, instead, conceived and articulated the policy in rigid, gender-linked terms, the policy does not self-generate changes in its terms as the relevant information develops; instead, the burden falls upon the female employees adversely affected continually to retest the policy as new conditions develop (if, indeed, they are not barred by *res judicata* principles once having done so unsuccessfully).

Thus, there is no escaping the conclusion that this is a situation in which the employer's use of an "illegitimate criterion to distinguish among employees" has resulted in precisely the harms the proscription on such criteria was intended to cure, and in which it is therefore "the employer's burden to justify decisions resulting from that practice." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion).

II. JOHNSON CONTROLS' FETAL PROTECTION POLICY CANNOT BE JUSTIFIED AS A BONA FIDE OCCUPATIONAL QUALIFICATION WITHIN THE MEANING OF § 703(e) OF TITLE VII.

Where a plaintiff alleges and proves that an employer has adopted a policy that is facially discriminatory and that adversely affects the plaintiff, that policy "is unlawful unless exempted by . . . some . . . *affirmative* justification,," *City of Los Angeles, Department of Water v. Man-*

hart, 435 U.S. at 711 (emphasis supplied); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 121-22. The *only* "affirmative justification" provided for in Title VII for an employment policy that expressly denies employment opportunities on the basis of gender is § 703(e), which sets out the bona fide occupational qualification ("bfoq") defense. *Phillips v. Martin Marietta Co.*, 400 U.S. at 544; *Dothard v. Rawlinson*, 433 U.S. 321 332-33 (1977); *Arizona Governing Committee v. Norris*, 463 U.S. at 1083-84 & n.13; *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1786 (plurality opinion); *see also id.* at 1787.[23]

In § 703(e), Congress provided that an employee's sex can be taken into account in making employment decisions in "those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The remaining statutory issue in this case is therefore whether Johnson Controls' fetal protection policy constitutes one of those "certain instances" that come within the bfoq exception.

The Court of Appeals in this case held (unlike the two other appellate courts that had addressed the precise question) that fetal protection policies do come within the bound of the bfoq defense.[24] In so concluding, the Court of Appeals fundamentally misconceived the overall thrust of the bfoq exception, as well as each of its component elements.

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[23] As with affirmative defenses generally (*e.g., United States v. First National City Bank of Houston*, 386 U.S. 361, 366 (1967)), and as in other situations under Title VII in which an employer defends against disparate treatment demonstrated by direct evidence, the burden of persuasion is on the employer to prove each of the statutory elements of the defense. *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion); *id.* at 1797-99, 1801 (O'Connor, J., concurring).

[24] *See Hayes v. Shelby Hospital*, 726 F.2d at 1549; *Wright v. Olin Corp.*, 697 F.2d at 1187; *see also Burwell v. Eastern Airlines*, 633 F.2d 361, 371 (4th Cir. 1980) (en banc).

A. This Court has directly addressed the general question of the reach of the bfoq defense in *Dothard v. Rawlinson, supra*, and in *Western Air Lines v. Criswell*, 472 U.S. 400 (1985).[25] *See also Trans World Airlines v. Thurston*, 469 U.S. at 122-24; Johnson v. Mayor & City *Council of Baltimore*, 472 U.S. 353 (1985). Those cases stress that "the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Dothard v. Rawlinson*, 433 U.S. at 334.[26] In particular, this Court has held

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[25] *Criswell* (and *Thurston*) were decided under the Age Discrimination in Employment Act (hereafter ADEA), not under Title VII. However, as *Criswell* itself recounts, the relevant bfoq language in the ADEA was borrowed directly from Title VII, and has always been understood to track the parallel provision in Title VII. 472 U.S. at 411-412, 413 n.18, 414 n.19, 416. We therefore proceed in the text on the premise that the standard set out in *Criswell* applies in general terms under Title VII.

[26] In support of its reading of the bfoq provision, *Dothard v. Rawlinson* pointed to the "consistent interpretation of the Equal Employment Opportunity Commission [EEOC]." 433 U.S. at 334. In general terms, the EEOC remains committed to the propositions that the bfoq should be interpreted "narrowly," and that "[t]he principle of nondiscrimination requires that individuals be considered on the basis of individual capacities." 29 C.F.R. § 1604.2. And the EEOC now agrees that the only pertinent defense in a fetal protection policy case is the bfoq defense. EEOC, Policy Guidance on United Auto Workers *v.* Johnson Controls, Inc. (Jan. 24, 1990) ("1990 EEOC Policy").

The EEOC's interpretation of Title VII's application to fetal protection policies has, however, been far from consistent. *See* Proposed Interpretive Guidelines by EEOC and OFCCP on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514, 16501 (1980), *withdraw* 46 Fed. Reg. 3916 (1981); EEOC, Policy Statement on Reproductive and Fetal Hazards Under Title VII, reprinted in BNA (Oct. 3, 1988); EEOC Compliance Manual § 624 (Reproductive and Fetal Hazards); 1990 EEOC Policy, *supra*.

In particular, the last two documents, both of which are currently in effect, are in some tension with each other upon whether fetal protection concerns may constitute a bfoq. *Compare* Compliance Manual § 624.4 ("The [bfoq] exception does not apply to [policies based on reproductive and fetal hazards]. That narrow exception applies only in situations where all or substantially all members

that to constitute a bfoq a job qualification must relate to the "essence" (*Dothard v. Rawlinson*, 433 U.S. at 333, 336) or the "central mission of the employer's business." (*Western Air Lines v. Criswell*, 472 U.S. at 413). Finally the precedents establish that bfoqs must be

> something more than "convenient" or "reasonable"; they must be "reasonably necessary . . . to the particular business," and this is only so when the employer is *compelled* to rely on [sex] as a proxy for the safety-related job qualifications validated [under the "essence of the business" test]. *Western Airlines v. Criswell*, 472 U.S. at 414.]

B. In giving precision to this Court's conclusion that the bfoq is an "extremely narrow exception" "the starting point . . . is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The pertinent wording of the bfoq defense contains no less than *six* different terms of limitation making it plain that the exception reaches only very unusual situations, and should not be interpreted in any way that would negate the basic prohibitions of the statute: Discrimination is permitted only in "those *certain* instances where religion, sex, or national origin is a *bona fide occupational* qualification *reasonably necessary* to the *normal* operation of that *particular* business or enterprise." Title VII § 703(e), 42 U.S.C. § 2000e-2(e) (emphasis supplied).

Had each of the underlined words been omitted, the exception would have applied in "those instances where

of a protected class are unable to perform the duties of the job in question.") with 1990 EEOC Policy, Pet. App. 127a-144a (adopting, at least for investigatory purposes, the view that the bfoq may, in very narrow circumstances, permit fetal protection policies that facially discriminate on the basis of gender.)

Thus, for purposes of determining under what circumstances, if any, broad gender-based exclusions grounded in fetal protection concerns can constitute a bfoq, the EEOC's views should be considered, but given no special deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

religion, sex, or national origin is a qualification [for] that business or enterprise." Thus, the six terms of limitation could have been eliminated without impairing the general thrust of the provision. That Congress nonetheless took care to include all six demonstrates an intent: (1) to prevent, through the "occupational" limitation, the use of subjective requirements of a general nature in contrast to objective verifiable requirements that concern job-related skills and aptitudes; (2) to preclude, through the references to "certain" circumstances and the "particular" business, reliance upon factors of broad applicability to many jobs and businesses; and (3) to assure, through the "bona fide," and "reasonably necessary" to the business's "normal" (as opposed to occasional or incidental) operation requirements, against pretextual, or overbroad, evasions of the basic statutory prohibition by such strategies as the imposition of peripheral, or inconsistently applied, qualifications.[27]

C. (1) In evaluating the employer's bfoq defense here, the most important—and, we believe, the independently determinative—question is whether that defense reaches a fetal protection policy that excludes fertile women from [redacted] jobs they are perfectly capable of performing. The limitation in the bfoq defense to "occupational" qualifica[redacted] heretofore been uniformly understood as spe-

[redacted] Judge Posner, in his dissent in the Court of Appeals, read the term "normal" as indicating some external societal moral judgment of the way the business is operated, rather than referring to the way a particular business in fact ordinarily operates. Pet. App. 54a.

The *Dothard* Court, however, understood the term otherwise in this statutory context, in finding that a bfoq existed because in the particular prison there at issue, "violence is the order of the day." 433 U.S. at 336. While Justice Marshall objected that that very circumstance, among others, made the prison unconstitutional and therefore not "normal," and complained that "the existence of such violations should not be legitimatized by calling them 'normal'" (*id.* at 342), the Court evidentally saw the statutory term as connoting no such policy judgments. *See also*, 5 Oxford English Dictionery (2nd Ed., 1989) p. 515.

cifying that *only* qualifications relating to job performance can justify an otherwise discriminatory employer policy. *Weeks v. Southern Bell Tel. & Tel. Co.*, 498 F.2d 228, 235 (5th Cir. 1969), *quoted in Dothard v. Rawlinson*, 433 U.S. at 338 (requirements concerning "the duties of the job involved").[28] For example, in *Dothard*, the primary skill of the job at issue, correctional counselor, was the ability to "maintain prison security." 433 U.S. at 335. The Court concluded that because of the likelihood of sexual assaults in the particular maximum security prison doing the hiring, "[t]he employee's very womanhood would thus directly undermine her capacity to provide the security. . . ." *Id.* at 336.

Similarly, in *Western Airlines v. Criswell*, the Court focussed upon "the nature of the flight engineer's tasks", and "the actual capabilities of persons over age 60" in relation to those tasks. 472 U.S. at 406. Thus, while *Criswell* was centrally concerned with the office of safety considerations in a bfoq case (*see, e.g., id.*, at 416, 420 *et seq.*), those safety concerns were not *independent* of the individual's abilities to perform the assigned tasks, but rather involved the possibility that, due to age-connected debilities, a flight engineer might not properly assist the airplane pilot, and might *thereby* cause a safety emergency.

The Title VII (and ADEA) cases in the lower courts, with the exception of the opinion below, also are substantially uniform in recognizing as bfoq's only requirements that in some sense or another relate to the ability

[28] At the time Title VII was enacted, over twenty states had fair employment practices legislation of one kind of another. The term "bona fide occupational qualification" appears in a number of those statutes, and was generally interpreted by the various enforcing courts and commissions to mean "'material to job performance'". *See* Jowell, *The Administrative Enforcement of Laws Against Discrimination*, 1965 Pub. L. 114, 141 (1965); Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 Vand. L. Rev. 965, 966-1010 (1965).

to carry out the duties of the occupation on the employer's behalf.[29]

A gender-based fetal protection policy, however, in no way involves the employee's ability to carry out assigned duties: Fertile women, so far as appears in the record, produce batteries as efficiently and proficiently as anyone else.

(2) The PDA provides added force to the foregoing points by making it particularly clear that only performance-related considerations can be taken into account when determining whether women of childbearing capacity are to be excluded from job opportunities. In addition to the definitional provision discussed above (at pp. 17-20, *supra*), the PDA provides:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same

[29] The bulk of the bfoq cases involving safety considerations are ADEA cases, and are similar to *Western Airlines v. Criswell, supra*, in that the bfoq was the danger that the employee would not be able to do his or her job properly. *See* cases listed in D. Cathcart, *Five Year Cumulative Supplement to Schlei & Grossman's Employment Discrimination Law* (1989) at 201-202.

While at least one court has held that nonpregnancy is a bfoq for some jobs (there, the position of airline attendant), the reason was that the court's conclusion that a pregnant flight attendant would not be able to perform her duties properly while pregnant. *Levin v. Delta Air Lines*, 730 F.2d 994 (5th Cir. 1984).

Some sex discrimination cases have upheld concerns for customer privacy, or for providing appropriate role models, as bfoq's. *See e.g. Chambers v. Omaha Girls Club*, 834 F.2d 697, 704 (8th Cir. 1987); *Torres v. Wisconsin Department of Health & Social Services*, 859 F.2d 1523, 1531 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1133 (1989); *Jones v. Hinds General Hospital*, 666 F. Supp. 933 (S.D. Miss. 1987). While there are reasons separate from the relationship to job performance that make it controversial whether these cases were correctly decided (*see e.g., Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971)), for present purposes it is sufficient that those cases *do* involve the employee's ability to perform the duties of the job, where those duties involve at least in part providing psychological comfort, assurance, or treatment of some kind.

> for all employment-related purposes. . . as other persons not so affected by *similar in their ability or inability to work* . . . . [Title VII § 701(k), 42 U.S.C. § 2000e(k) (emphasis supplied)].

This clause "explains the application of the general [PDA] principle to women employees." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. at 678 n.14. And, the legislative history of the PDA confirms what the statutory words say: that Congress' intent was to preclude practices that deprive women of job opportunities, temporarily or permanently, because of circumstances relating to childbearing, even though those workers are perfectly able to perform their job.

Thus, one of the "discriminatory practices based upon erroneous assumptions about pregnancy and the effect it has on the capacity of women to work" at which the PDA was directed were instances in which "the employer refused to consider women for particular jobs on the grounds that they might become pregnant, even though the evidence revealed that pregnant women *are perfectly capable of performing the work in question.*" Leg. Hist. at 61 (remarks of Sen. Williams) (emphasis supplied). Congress intended to prohibit such practices by passing the PDA:

> Under this bill, the treatment of pregnant women must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees. [S. Rep. at 4, Leg. Hist. at 41].

See also, e.g., S. Rep. at 6, Leg. Hist. at 43 ("perhaps the most important effect of this bill" is that "employers will no longer be permitted to force women who become pregnant to stop working *regardless of their ability to continue*") (emphasis supplied); Leg. Hist. at 24-25 (remarks of Rep. Hawkins) ("if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers

have done in the past, while they are perfectly able to do their jobs."); *Id.* at 132 (remarks of Sen. Cranston); *Id.* at 131 (remarks of Sen. Biden); H. R. Rep. at 6-7, Leg. Hist. at 152-53.[30]

(3) Congress had compelling reasons for directing that gender-based distinctions in employment generally—and childbearing and pregnancy related distinctions particularly—can be justified only on grounds related to job-performance capabilities.

First, our economic system generally assigns to employers the decisions as to what skills employees must possess to perform a particular job and assumes employer competence to make those decisions. Congress was therefore understandably reluctant uniformly to override such employer judgments concerning the production needs of their businesses. Consequently, as we readily recognize, the bfoq provision leaves limited room for validating such a production-related judgment by an

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[30] The extra cost of employing members of one gender, if any, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. at 716-18 & n.32. Indeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the "decision to forbid special treatment of pregnancy despite the special costs associated therewith." *Arizona Governing Committee v. Norris*, 463 U.S. at 1084 n.14. *See also e.g.* Leg. Hist. 19 (remarks of Rep. Bayh); *id.* at 26- 27 (remarks of Rep. Hawkins); S. Rep. at 9-10, Leg. Hist. at 46-47; Leg. Hist. at 64-65 (remarks of Sen. Williams); *id.* at 97-99 (remarks of Rep. Hatch); *id.* at 130 (remarks of Rep. Biden); H. Rep. at 9-10, Leg. Hist. at 155-56. Consequently, Congress *negated*, as a possible bfoq, the costs associated with compliance with Title VII as amended by the PDA.

Not surprisingly in light of this clear Congressional intent, the employer in this litigation has relied exclusively upon its concern for fetal health and a purported moral obligation to protect the fetus from parental negligence as the basis of its defense, and has *not* pointed to fears of monetary loss through liability for fetal injury or the added costs of further decreasing lead exposure at its facilities as reasons for its policy. *See, e.g.*, Pet. App. 6a, 81a-82a.

employer. (Because even a skill-related/gender-based distinction is at odds with the basic statutory norm, the bfoq provisions do require that the employer's judgment in this regard be based on objective grounds. *Western Airlines v. Criswell*, 472 U.S. at 419, 422-23.)

In contrast, where the employer's reasons for excluding workers from job opportunities on the basis of gender are, instead, *non-job-performance related concerns*—whether involving the health of future generations or otherwise—there is *no* basis for assuming any special employer expertise. And, absent such an assumption, there is *no* reason for permitting an employer decision as to what is best for an employee to override the contrary, and personal, decision of the employee whose job rights would be adversely affected by the employer's decision.

Indeed, once cut loose of the need to prove a job performance-related reason for their actions, employers would be free to express, *at the expense of the basic Title VII proscription against gender-based decisionmaking*, a wide range of otherwise perfectly legitimate, and indeed praiseworthy, ethical and moral concerns. Since each employer could then decide whether and to what degree to make non-job-performance related concerns the basis for sex discrimination which otherwise would violate Title VII (subject, of course, to the statutory requirement that he or she prove that a gender-based distinction is "reasonably necessary" to the achievement of the ethical and moral goals set for the "particular business"), each employer's decision in that regard would simply represent his or her own balance of the statute's nondiscrimination goals against his or her own moral and ethical agenda. That, would tilt the balance Congress struck for the nation as a whole in making elimination of employment discrimination a preeminent societal goal, not subject to defeasance by individual employers.[31]

[31] Judge Posner suggested in his dissent below that tort law concepts may provide appropriate parameters for placing some socially-defined limits on an employer's non-job performance concerns. Pet. App. 66a-67a. If so (*but see* p. 29, *supra*), the fact that no one has pointed to a successful lawsuit against an employer for causing fetal harm indicates that the employer's fetal protection concerns here are *not* sanctioned by common law concepts.

It is true that in recent years courts have determined that children may sue for torts committed upon them before birth. Pet. App. 66a. But it also continues to be true that to recover a plaintiff needs a plausible liability theory. And, as the law stands there is no such theory available where the employer reduces a hazard to a fetus to the degree feasible, warns the mother of any remaining danger to her fetus, and is precluded by federal law from removing the mother from the workplace.

Specifically, under a negligence standard, Johnson Controls could fulfill its duty of care by meeting OSHA standards, taking all actions that a reasonable company would take to further reduce exposure to the risks which an employer reasonably should be aware (such as providing respirators), and taking reasonable care to warn workers about those significant risks of which an employer should be aware. Restatement of Torts (Second) § 388; David Fischer and William Powers Jr., Product Liability Cases and Materials 214 (West 1988).

Under the product liability standard, lead could conceivably be considered an unavoidably unsafe product which is nonetheless reasonable to market because of its social utility. Restatement of Torts (Second) § 402A, comments i, j & k (1965). For such products a manufacturer will *not* be liable for marketing a defective product if the manufacturer issues adequate warnings about those risks not generally known to consumers but about which a manufacturer, held to the standard of knowledge of an expert, should or could be aware. *See, e.g., Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); Restatement of Torts (Second) § 402A comment j (1965). In the situation of substances that pose a risk of fetal harm should a woman become pregnant while exposed, warning the woman satisfies the duty to warn, since it is a physical impossibility to warn a fetus, either potential or actual. *See, e.g.*, cases such as *Needham v. White Laboratories*, 639 F.2d 394, 400-02 (7th Cir. 1981), and 847 F.2d

Second, allowing such atomistic decisionmaking regarding the relative value of the nondiscrimination goal and other valid ethical and moral concerns would open the

door wide to abuses. The more general the inquiry and the broader the exception, the easier it is for an employer to press otherwise laudable non-job-performance related concerns into service as a cover for a desire to eliminate female employees from his workforce and to do so for illegitimate reasons. While it is true that a plaintiff would then have the opportunity to prove that the occupational qualification is not "bona fide," it is likely to prove quite difficult to demonstrate that an employer does not really have a particular, widely shared social or moral goal at heart.

The fetal protection issue illustrates both of the foregoing points. As a practical matter, employers in industries in which *few* women are employed are more likely to be attracted to fetal protection policies than other employers. *See* Paul, Daniels and Rosofsky, *Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey*, 16 American Journal of Industrial Medicine 267 (1989); Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1237-1241 (1986). In male-dominated industries, there is, from the employer's point of view, little disadvantage to excluding fertile female workers, since male workers are readily available to

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358 (7th Cir. 1988) (setting out duty to warn in case involving transplacental carcinogen).

Thus, in this instance any incorporation of tort liability concepts as an aspect of a bfoq defense reduces, on the one hand, to an argument that Johnson Controls should be allowed to violate the federal prohibition on sex discrimination so that the company can with impunity provide an unreasonably dirty workplace, or can fail to provide adequate warnings to its workers. Acceptance of that argument would simply reduce occupational health for all workers, while condoning discrimination. Alternatively, the liability argument assumes that a state could hold an employer liable in tort *simply* for refusing to exclude the woman from the workplace, perhaps on a negligent hiring theory. If, as we contend here, such an exclusion would violate Title VII, then any such state cause of action would be voided by the preemption provisions of the statute. 42 U.S.C. § 2000e-7, § 2000h-4. *See generally California Federal Savings & Loan Assoc. v. Guerra, supra.*

fill the positions. That being so, a felt concern for fetal health, an unwillingness to incur the additional costs of employing potentially pregant women (such as disability and medical benefits during pregnancy), a reluctance to cleanse the workplace of dangers because of the cost of doing so, particularly where special protective equipment or hygienic facilities for women would be necessary, or a simple unwillingness to employ women because of prejudice or stereotyping could persuade an employer that, on balance, he would rather not employ fertile women.

In contrast, because of the need to retain an adequate workforce, in the *most female-intensive* workplaces, employers rely on having women workers of childbearing age, and may not be able to operate without them. This is why, presumably, fertile women are not likely to be excluded wholesale from jobs as childcare workers, nurses, or dental assistants, among other examples, even though those jobs involve exposure to fetal hazards. Becker, *supra*, 53 U. Chi. L. Rev. at 1238.

Thus, the willingness of employers in male-dominated industries to exclude broad classes of women for fetal protection purposes reflects a subtle assumption that women are nonessential workers, who are better excluded than accommodated. And that assumption is precisely the one that the PDA, in particular, was enacted to preclude. *See* pp. 18-19, *supra*.

Third, permitting employers to justify gender-based exclusions on the basis of non-job-performance related considerations is likely to lead *both* to more discrimination *and* to poor social decisionmaking.

Initially, certain ethical and moral goals, including promoting of child and fetal health, are widely accepted in this society. But it does *not* follow that delegating society's determinations on such matters as the appropriate relative balance between women's employment in-

teresting and fetal health concerns to individual employers is an appropriate response. Individual employers, for example, have no incentive to consider factors that do not involve their workplace directly, and may well exclude women, not to solve—but simply to eliminate the employer's connection to—a complex social problem.

Again, fetal protection provides an appropriate illustration. As one might expect, in passing the PDA, Congress did not insist upon the job capability standard in ignorance of the common-sense facts that pregnant women carry their fetuses within their bodies to the workplace.[32] To the contrary, the fetal health issue that is the subject of this case was specifically raised during the hearings on the PDA. The fear that the bill might increase exposure of women to fetal risks in the workplace was raised, but Congress was not persuaded thereby to alter its requirement that women of childbearing capacity be judged only upon performance-related criteria.[33]

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[32] That fetal protection issues surfaced during the consideration of the PDA is not surprising. The questions were ones receiving attention in the Nation at the time: The OSHA hearings concerning the lead standard, during which, as noted (p. 2, *supra*), reproductive health concerns and the propriety of excluding women from lead-exposed jobs were discussed at length, were in process during precisely the same period that Congress was considering the PDA.

[33] The assumption of those addressing that question was that the bill would indeed require employment of women of childbearing capacity on the basis of their *own* determination whether to work, and the issue addressed was whether that requirement would create occupational health issues affecting the fetus.

For example, during the both sets of hearings, the representative of the United States Chamber of Commerce raised directly the question of employer responsibility for fetal health:

> S. 995 could present job health problems. For example, it requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such work arguably posed a threat to the health of either the mother-to-be or the unborn child. [Hearings before the Subcommittee on Labor of the Committee on Human Resources, United States Senate, on S. 995, 95th Cong., 1st Sess. (April 26, 27 and 29, 1977) ("Sen. Hearings") at 110.]

Further, Senator Hatch asked one of primary witnesses in support of the proposed legislation, Dr. Andre Hellegers, "Do you think there would rise a whole slew of OSHA problems, occupational safety and health problems, as a result of pregnant women?" Dr. Hellegers responded:

> Let me put it this way: . . . if we are talking about untoward effects on the industrial process on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three, and we aren't doing much of that. [*Id.* at 67.]

See also id. at 110 (remarks of Sen. Hatch) ("If we grant this particular bill we may have OSHA problems.").

It is especially pertinent in assessing Congress' approach to the fetal health issue in the PDA to understand that the Legislature realized, as the employer in this case and the Court of Appeals apparently do not, that the relationship between fetal health and female employment is a complex one: There are—as was discussed at length both at the PDA hearings and on the floor of Congress—fetal risks *both* in the processes and materials used in many workplace situations *and* in depriving fertile and pregnant women of income through denial of employment opportunities. Senator Williams put the problem in its fullness as follows:

> . . . Mr. President, I want to emphasize testimony received by the Committee from the American Nurses' Association, and from an eminent obstetrician, Dr. Andre Hellegers, which documented the concrete connection between loss of income during the disability phase of pregnancy and a deterioration of the health of the pregnant woman and of her child which results from impaired access to a healthful life situation.
>
> In addition, there is a relationship between infant prematurity and income. It is estimated that prematurity costs the Nation $1 billion per year for care

> and hospital nursing alone, not to mention the cost of certain lasting effects which can result from prematurity. . . . We must . . . consider the cost which is imposed on society when working women and their families are denied adequate income for a decent standard of living. This cost is felt in terms of medical complications for both the women and the child. [Leg. Hist. 65 (remarks of Sen. Williams).][31]

Thus, Congress did not disregard fetal health concerns in directing that women "perfectly capable of performing the work in question" (Leg. Hist. at 61 (remarks of Sen. Williams)) cannot be excluded from employment opportunities, regardless of their childbearing capabilities. To the contrary, Congress, unlike an individual private employer, was in a position to weigh the *totality of the social concerns* involved in depriving fertile women of employment opportunities, including the risk of long or short-term unemployment or underemployment, and concluded on balance to allow fertile women, like other workers, "to continue working unless their doctors regard them as physically unable to work." Leg. Hist. at 24-25 (remarks by Rep. Hawkins).

(4) It is also very much in point that when the PDA was enacted, Congress had already put in place a mechanism that, unlike employers acting independently, *is* suited to making the complex social decisions involved in

[31] *See also* Leg. Hist. 3 (remarks of Sen. Williams); *id.* at 7 (remarks of Sen. Brooke); *id.* at 116 (remarks of Sen. Williams); *id.* at 170 (remarks of Rep. Sarasin).

The evidence presented in this regard during the hearings was extensive. Dr. Hellegers attached to his testimony a chart showing "the marked *decrease* in *prematurity* as *income increases*", and stressed "the well-known relationship between premature births and subsequent nervous system disabilities, such as mental retardation and learning defects." Sen. Hearings at 75-76. *See also id.* at 64; House Hearings at 54, 58, 59 (similar testimony by Dr. Hellegers). The American Nurses Association also presented a lengthy discussion of the close relationship between maternal income and fetal health. Sen. Hearings at 470-476; *see also* House Hearings, April 6, 1977, at 274-278 (statement of American Nurses Association).

this case. That mechanism is the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* Under that statute, the Occupational Health and Safety Administration has the responsibility to develop occupational health standard protecting "every working man and woman", including fertile women, and the duty to include reproductive health of workers, including the health of the children they bear, within its consideration. 29 U.S.C. § 655(b). *See United Steelworkers of America v. Marshall*, 647 F.2d at 1256. Thus, when Congress decided in the PDA to require employers to hire women capable of bearing children on the basis of their ability to perform the job, then, the Legislature was not relegating fertile women to unregulated workplaces and to unregulated employers free to ignore the dangers for fetal health.

Indeed, as noted (*see* n.32, *supra*), OSHA was considering at the precise time the PDA was before Congress the very question in this lawsuit—whether it is necessary or appropriate to exclude women from jobs involving lead exposure. After holding lengthy hearings, compiling a massive record, and reviewing conclusions by staff members with substantive expertise in assessing different kinds of scientific studies (*see generally United Steelworkers of America v. Marshall*, *supra*), OSHA determined that lead at the blood lead levels which Johnson Controls regards as unsafe for fertile women is also unsafe for male reproduction, but that, without gender-based exclusions, both men and women can have healthy offspring through adequate special protections, including medical surveillance, possible use of respirators, and temporary removal if medically indicated. *See* n.2, *supra*.[33]

The employer here maintains, on the basis of much more sparse expert evidence, reviewed by federal judges with no particular scientific expertise, that OSHA was wrong both about the adverse male-mediated fetal effect,

[33] The index to the OSHA lead standard record alone runs 129 pages. *See* Inorganic Lead H-004 Exhibit List, submitted to the D.C. Circuit in *United Steel Workers of America v. Marshall*, *supra*.

and about the safeguards for women adequate to protect fetal health. The appropriate response is that the problem of reconsidering the proper lead level both for workers generally and for fertile women particularly should go forward not in a series of individual court proceedings, likely to yield disparate results, but before OSHA, the agency Congress designated as the entity to handle the determination of occupational health standards. *See* 29 U.S.C. § 655(b).[36]

In sum, in excluding fetal protection concerns from the bfoq defense Congress was not denigrating the importance of fetal health but rather making one of an interlocking series of decisions as to *how* to most rationally forward that social interest.

D. There is another, overriding reason why Congress could not have intended to include fetal protection concerns within the bfoq defense. The bfoq is limited to "certain" circumstances of the "particular" business. This Court has interpreted that language as requiring that to constitute a bfoq, a job qualification must relate to the business' "essence" or "central mission." *See* pp. 27-28, *supra*. The Court of Appeals holding that fetal protection

[36] For example, in *Johnson Controls v. Fair Employment & Housing Commission*, 218 Cal. App. 3d 517 (1990), the California Court of Appeal, considering the validity under state law of the *same* fetal protection policy at issue in this case, looked at both the *same* expert evidence presented in this case (*see* Jt. App. 72a, submitting into this record testimony from California case); 218 Cal. App. 3d at 519 (citing evidence in this case) and additional expert testimony presented in that one (with full opportunity for cross-examination), and came to quite the opposite conclusion as to the scientific facts regarding lead. *See* 218 Cal. App. 3d at 537-38.

The present point is not that the California court was right and the Seventh Circuit wrong (although we believe that to be the case, particularly on a summary judgment record where the only question is whether there is a material issue of disputed fact), but that the two courts, considering much the same evidence, came to quite opposite conclusions on a scientific question as to which neither had any expertise, and as to which there *is* a federal expert agency which has already answered the very same questions.

is part of the "essence" of Johnson Controls' business, based on reasoning that would apply to a broad range of businesses, would permit widespread violation of the basic PDA prohibition against discrimination against women based on their childbearing capacity. That result is contrary to Congress' intent that the bfoq be a narrow exception to Title VII.

The number of workplace situations in which there may be some particularized risk to fetal health is extensive:

> [P]otential [fetal hazards] in the modern workplace rang[e] from toxic chemicals in the office, to biological hazards in the hospital and laboratory, to pesticides on farms, to heavy metals such as lead, cadmium, and mercury in industry, according to a number of experts. In addition . . . some health professionals have suggested that radiation emitted by video display terminals, stress, and noise may be possible factors in reproductive problems. [Bureau of National Affairs, *Pregnancy and Employment* ("BNA") (1987) p. 62.].

See generally U.S. Congress, Office of Technology Assessment ("OTA"), *Reproductive Health Hazards in the Workplace*, pp. 69-126 (1985).[37] While the precise number of workers exposed to hazards to which fetuses are especially sensitive can only be estimated, a 20 million figure has been accepted by the EEOC (*see* 45 Fed. Reg. 7514 (1980)), and, given the range of industries affected, does not seem at all out of line.

[37] Some of the industries in which there is substantial evidence of fetal risk include those in which women have traditionally been most heavily employed, including hospitals and childcare centers. *See* BNA, *supra*, at 68, 86-87; 19 Occupational Safety and Health Reporter 1223 (December 6, 1989) (between 25% and 60% of preschool children cared for in daycare centers have a virus that is harmless to them, but which, if it infects female childcare workers during the first 21 weeks of pregnancy, places the fetus at an increased risk of about 15% of permanent neurological damage). In addition, new technologies have been implicated as fetal hazards. *See* BNA, *supra*, at 82-83.

Moreover, as Judge Easterbrook noted in dissent below (Pet. App. 92a), if an employer's concern for fetal health justifies overriding a woman's own informed judgment concerning whether working entails an unreasonable risk to a fetus she may be carrying, there is *no* reason why that concern can be lawfully exercised only in situations in which the fetus is at heightened risk, as compared with the mother. Rather, it would appear that an employer could assert that concern with regard to situations presenting equal risks to *both* women and their fetuses on the ground that the woman is entitled to expose herself to potential injury. but should not be permitted so to expose her fetus. As here. the employer could maintain a moral responsibility for the fetus; alternatively, liability considerations such as those suggested by Judge Posner in dissent below would not differ depending upon whether or not the fetus was harmed by factors to which fetuses are especially sensitive. Thus, if considered a bfoq, the fetal protection concern would permit exclusion of women from almost all non-sedentary positions, including jobs that involve driving cars or trucks.[38]

In short, as Judge Easterbrook explained below, if employers are permitted to regard perfect fetal safety, without more, as a bfoq, "the law would allow employers to consign more women to 'women's work,' while reserving better-paying but more hazardous jobs for men." Pet. App. 100a. The result would be gravely to compromise Congress' intent to "permit the 36 million working American women to assume their rightful place, and make a full contribution to our Nation's economy" by

[38] The potential of the Court of Appeals' rationale to exclude women from the workplace is further increased by that court's acceptance of the basis upon which the employer here has sought to justify exclusion of *all fertile women*, rather than exclusion of pregnant women only: that "frequent 'unplanned or undetected pregnancies' are 'one of the exigencies of life'" (Respondent's Brief in Opposition at 3-4); such pregnancies are certainly not limited to "certain circumstances" or to the essence of any "particular" business.

"providing effective protection against discrimination on the basis of their childbearing capacity." Leg. Hist. 61-62 (remarks of Sen. Williams).

E. Finally, the Court of Appeals' bfoq analysis contravenes the statutory language of the bfoq provision, as well as this Court's construction of that language, for yet another reason: As this Court explained in *Western Airlines v. Criswell*, 472 U.S. at 412-17, only where the employer is "compelled" to rely on gender "as a proxy" is the resulting policy a "bona fide" policy "reasonably necessary" to a business' "normal" operation.

(1) To meet this standard there must be some exclusively gender-linked concern upon which the policy is based, rather than a concern applicable to both genders. Where that condition is not satisfied, the gender-based distinction is not "compelled," and therefore not "bona fide" nor "reasonably necessary" to the business. *See Dothard v. Rawlinson*, 433 U.S. at 336 (special threat because of "employee's very womanhood"). In this case Johnson Controls' fetal portection policy is essentially one of perfect protection; *viz.*, of assuring that there is *no* risk of fetal injury. To meet the "bona fide" and reasonably necessary standards the company must show that the same perfectionist approach to other health issues in its workplace does *not* require the exclusion of males.[39]

[39] As the Eleventh Circuit, in *Hayes, supra*, recognized "a certain amount of subtle bias . . . has focused research on the hazardous effects of workplace substances as they pertain to reproductive health on women more so than on men." 726 F.2d at 1548-49, *citing* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII*, 69 Geo. L. J. 641, 661 (1981). The *Hayes* solution to the skewed research problem was to hold that "In those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women." 726 F.2d at 1549.

This approach cannot be squared with Title VII: As this Court held last year in *Price Waterhouse v. Hopkins, supra*, once an employer has engaged in gender-based discrimination, the burden of

In concluding that the employer had carried the burden of proving that its fetal policy is a bfoq on this summary judgment record, the Court of Appeals did *not*, however, consider the legally critical questions whether the company had proven, without any material dispute of fact, that adult human beings and their live children are in no danger due to lead exposure at the levels considered dangerous for fetuses, and whether *only* fertile women (and not fertile men) present a danger of fetal risk due to lead exposure. Pet. App. 50a-59a. Plainly, the company did *not* carry this burden of proof beyond material dispute: Plaintiffs' experts testified at length, pointing to scientific studies and to governmental documents, that lead at the levels the company considers safe for adults entails serious health risks for those exposed, including danger of cardiovascular disease, nonfetal reproductive injury, and neurological effects. *See* nn. 5-7, *supra*. And as to male-mediated fetal health effects, whether or not the plaintiffs' evidence in this regard was sufficient to prove that there *is* such an effect (which we believe it was) (*see* Pet. App. 33a-36a), it was certainly sufficient, especially in combination with OSHA's conclusion that there *is* such an effect, to raise a substantial factual question regarding an issue as to which the burden was on the *employer*.[40]

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establishing any justification is on that *employer*. That necessarily means that where the issue is uncertain, the defendant loses, a result fully consistent with the proscription upon gender-based decisionmaking that is at the core of Title VII. Indeed, since the research bias itself may reflect in part stereotypical ways of thinking about and conducting research on, women, allowing employers to rely on one-sided research would be particularly contrary to Title VII's purposes.

[40] The Court of Appeals did review the male-mediation issue as part of its business necessity analysis, putting the burden of persuasion *on the plaintiffs*. *See* n.7, *supra*. In so doing, that court refused to accept as pertinent animal studies proferred by plaintiffs' experts in support of the proposition that there are male-mediated fetal risks. Such studies are widely accepted by OSHA and other federal agencies to make risk assessments, and by scientists in general, (*see, e.g.*, Academy of Sciences and National Research Council, *Risk Assessment in the Federal Govednment: Managing the Process* 22 (1983); Toxic Substances Control Act, 15 U.S.C. § 2603(b)(2)(A); 43 Fed. Reg. 52952 (OSHA lead standard)) and therefore should be recognized as probative evidence under Fed. R. Evid. 401. Moreover, human studies proving directly male-mediated risks are extremely difficult to conceive and to carry out, and are in fact rarely undertaken for those reasons as well as because of a tendency to conceive of fetal injuries as a problem most probably traceable to the mother. *See* Jt. App. 256 (Legator) (because of the nature of the problem there will probably never be direct human studies of male mediated human risks); Office of Technology Assessment, *Reproductive Health Hazards in the Workplace, supra*, at 8.

(2) Certainly the *Western Airlines v. Criswell* standard also requires that a gender-based policy be the narrowest practicable means for meeting the valid interest at stake. The Court of Appeals did not even put Johnson Controls' fetal protection policy to that test much less show that the policy passed.

For example, while fetal health cannot be tested directly, there is a readily available practical alternative:

Although petitioners therefore raised the propriety of the Court of Appeals ruling as one of the "questions presented" in the Petition of Writ of Certiorari (at i), in opposing *certiorari* respondents conceded that "*of course* animal studies can constitute an important predictive tool in appropriate cases" (Respondent's Brief in Opposition, at 23 (emphasis added)), and maintained only that the Court of Appeals had excluded the animal studies proferred not as a matter of law but as a matter of fact. That is not the case, both for reasons explained in Petitioners' *Certiorari* Reply Brief, at 9 n.6, and because these were summary judgment proceedings, so that the Court of Appeals was in no position to choose between competing experts as to the propriety of relying on particular animal studies. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-50, 255 (1986).

Because respondent has *conceded* the legal issue concerning animal studies raised in the petition, and because, in any event, under the analysis is this brief the *plaintiff* has *no* burden to prove male-mediation, in regard to question 2, we rely on the points made in this footnote. *See also*, discussing the question of the propriety of reliance on animal studies in legal proceedings, Brief Amicus Curiae of Natural Resources Defense Council et al. on Behalf of Petitioners.

viz, frequent bloodtesting.[41] The company already provides for monthly individual blood testing of new employees (Jt. App. 124), yet justifies its failure to offer monthly individual blood testing to fertile women, rather than excluding them from the workplace entirely, on the ground that those employees are unfamiliar with the job, and may, between tests, store up enough lead in the body to be dangerous if the woman becomes pregnant soon thereafter (Pet. App. 101a).[42] But that is at best a remote contingency.[43]

Since the exclusion the company wishes to justify is an extraordinarily broad one, and is directly contrary to the individual treatment value at the core of Title VII, the company cannot meet its burden of proving the reasonable necessity of its *discriminatory* policy without demonstrating that the available *nondiscriminatory* alternatives are not only less protective, but *significantly* less protective. Otherwise, while it may be " 'convenient' " or " 'reasonable' " (*Western Airlines v. Criswell*, 472 U.S. at 414) for the employer to dispense with individual blood testing, warnings, and training in favor of excluding women there is no "compelling" need to do so (*id.*).

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[41] In addition, the employer has never provided *any* basis for regarding exclusion of women from *non*-lead exposed jobs which happen to be in the same lines of progression as lead exposed jobs as "reasonably necessary" to its business.

[42] The company does not explain why inexperienced male employees are not also in at least some danger of incurring blood lead levels above those considered safe for them, or of bringing home lead dust on their clothes and exposing their children. (*See* Jt. App. 158, 163 (Fishburn); 174-75 (Chisholm); 183 (CDC Report) (41.8% of children tested whose parents worked in lead exposure had blood lead levels of 30 μg/dl or more).

[43] Lead stores in the body only after exposure for some period of time. Moreover, to create the danger feared, a woman soon after assignment to a lead exposed job would have to ignore adequate warning regarding fetal health issues *and* become pregnant within months of starting a new job, *and* not pay attention to the careful training of employees newly assigned to lead-exposed positions, when they generate a high blood lead reading.

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For all these reasons fetal protection policies do not, as a general matter, come within the bfoq defense and, on this record, Johnson Control's exclusion of all fertile women can not possibly be said to be saved by the bfoq.[44]

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[44] As the plurality opinion in *Price Waterhouse v. Hopkins*, *supra*, noted, "some courts"—namely, the court below, as well as the *Hayes v. Shelby Memorial Hospital*, and *Wright v. Olin Corp.*, courts—have suggested that there is in addition to the bfoq an implicit affirmative defense where an employer takes the position that "its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy." 109 S. Ct. at 1789. The attempt to avoid the bfoq analysis discussed in the text was most fully articulated in *Hayes v. Shelby Memorial Hospital*, *supra*, a case involving exclusion of *pregnant* women only.

In general terms the *Hayes* court held that where an employer claims aneutral purpose for an explicitly gender-based policy excluding women alone from employment opportunities, illegal facial discrimination will only be presumed; if the employer can bear the burden of demonstrating affirmatively that the employer's purpose is a substantial one that can by its nature be satisfied only by burdening one gender but not the other, the *Hayes* court concluded, the policy is in fact a neutral one, although expressed in gender-based terms.

This case in contrast to *Hayes* is one in which the employer policy at issue burdens *all fertile women* and does so without any showing that nothing less will fairly meet the employer's safety concern. There is, consequently, no need to consider directly in this case, as there was in *Hayes*, whether the statutory bfoq is the only affirmative defense that applies to a distinction based upon *pregnancy as such*.

We observe, however, that there is no ground, given the PDA, for reading a new statutory defense into Title VII for pregnancy-based distinctions. The PDA defines the term "on the basis of sex" as including "on the basis of pregnancy" for purposes of all of Title VII. The bfoq concerns those situations in which Congress determined that it is lawful to make hiring and employment decisions "on the basis of sex." In light of the PDA, § 703(e) necessarily covers employment distinctions made "on the basis of pregnancy, childbirth, or related medical conditions." Thus, Congress *did* address the question whether and under what circumstances pregnancy-based hiring and employment decisions are justified. There is no more basis than there is with regard to any other form of

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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sex discrimination for reading into Title VII an additional exception for pregnancy-based exclusions that Congress declined to enact.

Moreover, under the *Hayes* approach, the relevant defense that does appear in Title VII, the bfoq, would have no function. The role of the bfoq defense is precisely to describe the circumstances under which the employer is entitled to favor one sex over another because that sex inherently has some characteristic the other sex does not have. The *Hayes* approach is directed at the same problem. Yet, under *Hayes*, the bfoq's requirements as carefully spelled out by Congress would become irrelevant, since all cases that could come within the bfoq would be redefined as not involving facial discrimination at all, before the bfoq defense was ever reached.